INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:

Federal Maritime Board v. *Isbrandtsen Co.*, 356 U.S. 481	3
Pacific Straits Conference v. *Federal Maritime Commission*, 350 F. 2d 864	5
Swedish-American Line v. *Federal Maritime Commission*, No. 18,554, C.A.D.C., decided June 10, 1965	9

Statutes:

Shipping Act, 1916, as amended, 75 Stat. 762, 46 U.S.C. 813a *et seq.*:	
Sec. 14b	2, 3, 5, 6, 7, 8, 9
Sec. 15	9

Miscellaneous:

27 Fed. Reg. 2647	4
28 Fed. Reg. 74	4
S. Rep. No. 860, 87th Cong., 1st Sess.	7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 622

PACIFIC COAST EUROPEAN CONFERENCE, PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE, AND THEIR RESPECTIVE MEMBER LINES, PETITIONERS

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL MARITIME COMMISSION AND THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 350 F. 2d 197. The opinion of the Federal Maritime Commission is reported at 3 S.R.R. 677.

JURISDICTION

The judgments of the court of appeals were entered on February 3, 1965, and an order denying petitions for rehearing was entered on April 30, 1965. The petition for a writ of certiorari was filed on September 27, 1965, within the extension of time granted on July 17, 1965 (Pet. App. C). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 14b of the Shipping Act, 1916, as amended, authorizes the Federal Maritime Commission to require dual rate contracts to include provisions not submitted by steamship conferences and not required by Sections 14b(1) to (8)?

2. Whether the Commission may formulate the provisions of such contracts in rulemaking proceedings, rather than on a contract-by-contract basis?

STATUTES INVOLVED

Section 14b of the Shipping Act, 1916, as amended, 75 Stat. 762, 46 U.S.C. 813a, is set forth in the Petition Appendix A, pp. 1-4.

STATEMENT

Petitioners, two conferences of common carriers by water in the foreign commerce of the United States, challenge two Federal Maritime Commission orders which prescribed the form of the "dual rate" contract they are required to use. Dual rate contracts grant

lower than regular freight rates to shippers who obligate themselves to ship exclusively via conference vessels.

In 1958, this Court in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, held the dual rate contract there involved, notwithstanding its approval by the Maritime Board, to be in violation of Section 14, Third, of the Shipping Act, 1916. The effect was to cast doubt upon the legality of dual rate systems then in use. On October 3, 1961, Congress passed Public Law 87-346, 75 Stat. 762, which added Section 14b to the Shipping Act, 1916. The section requires that (a) the Commission permit the use of a dual rate contract unless it finds that the contract "will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair * * *"; (b) the contract expressly provide for eight specific contingencies (§14b(1)-(8)); and (c) the contract contain "such other provisions not inconsistent herewith as the Commission shall require or permit." (Section 14b(9)). Section 3 of Public Law 87-346 provided for the interim validity of existing contracts and required the conferences to revise their contracts to comply with the provisions of the amended Shipping Act and to file the revised contracts for approval within six months after enactment of the 1961 amendment.

Petitioners are two of the sixty conferences which filed contracts with the Commission for approval. Each of the contracts was published in the Federal Register and comments thereon were invited. Subse-

quent to the filing of the contracts, the Commission gave notice by publication in the Federal Register (27 Fed. Reg. 2647) that it was considering the adoption of a uniform contract and later published a "Notice of Proposed Final Rules and Uniform Agreement" (28 Fed. Reg. 74) in which the Commission's proposed uniform contract was set out.

After considering comments and protests directed to the adoption of a uniform contract, the Commission scheduled individual hearings for each contract filed for approval. Contracts which covered related trades, or which contained similar terms, were consolidated for hearing, resulting in some twenty-two separate proceedings and a hearing examiner was assigned to each proceeding. At the instigation of shippers and shipper-related associations who were faced with the burden of participating in all twenty-two hearings, the Commission severed the so-called "major issues" from the individual hearings and assigned a panel of five hearing examiners to conduct the major-issues proceedings, which was designated Docket No. 1111. Thereafter, the panel rendered its decision in Docket No. 1111 and the hearing examiners assigned to the twenty-two hearings made their initial decisions which approved the contracts with modifications.

On March 27, 1964, the Commission issued a single report entitled *The Dual Rate Cases* (Supp. App. to Pet., 119-180), in which it ruled on all the exceptions made to the decisions in the separate hearings and in Docket No. 1111. The Commission explained that it had discussed all the contracts submitted for approval

in one report for the reason, among others, that the legislative history of the 1961 amendment made it plain that "insofar as was possible dual rate contracts should be standard or uniform" (*id.* at 127) in order to simplify the problem of shippers regarding the meaning and application of the contract provisions (*id.* at 127-129). The Commission approved all contracts which were submitted but with certain modifications which it believed were authorized by Section 14b. The modifications included provisions which Section 14b did not specifically require (*id.* at 160, *et seq.*), certain of which had not been dealt with in any of the hearings before the examiners. The orders entered by the Commission approved the contracts "in the form attached to this order" and provided that the attached form of contract should be used "to the exclusion of any other terms and provisions for the purpose of according merchants, shippers, and consignees contract rates" (Supp. App. to Pet., p. 227, 241).

Of the sixty conferences affected by the Commission's ruling, the two petitioners in this Court and two other conferences [1] filed petitions for review. The court of appeals held that Section 14b(9) authorized the Commission to add provisions in the dual rate contracts which are neither specifically required by

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[1] The other conferences, Latin America/Pacific Coast Conference and Pacific Straits Conference, have sought no further review in this Court. The former was a party below in the instant case (Pet. App. B, p. 1) and the latter's petition was disposed of in a later *per curiam* opinion on the basis of the decision in the instant case. *Pacific Straits Conference* v. *Federal Maritime Commission*, 350 F. 2d 864 (C.A. 9).

Congress nor submitted by the conferences (Pet. App. B, p. 8). It further held that the procedures followed by the Commission were proper except as to those provisions which the Commission required to be included in the contract which had not been considered in the hearings before the examiners. As to these, the court remanded the matter to the Commission with directions to allow the petitioners an opportunity to be heard regarding them. The petition for a writ of certiorari followed.

ARGUMENT

The petition presents no substantial question warranting further review by this Court. There is no conflict between the circuits, and the decision below is plainly correct.

1. Petitioners assert that the court below "refused to consider whether the substance of the Commission's order was inconsistent with the eight specific requirements of Section 14b * * *." (Pet. 16). The fact is, however, that petitioners in effect abandoned any claim of inconsistency. While making the broad assertion of inconsistency, petitioners failed to particularize just how the contracts which the Commission ordered them to use are inconsistent with the statute. The court below therefore properly concluded that petitioners were "not primarily attacking the substance of the contracts approved by the Commission * * *" (Pet. App. B, p. 7). Moreover, petitioners continue to refrain from specifying any inconsistency between the Commission's form contract and the statute.

2. Petitioners seem to question the authority of the Commission to require that the contracts include provisions which were not submitted by the conferences and which were not specified by Congress in Section 14b (Pet. 17). Section 14b(9), however, provides that dual rate contracts shall contain "such other provisions not inconsistent herewith as the Commission shall require or permit." The court below found in this unambiguous language "plain authority in and direction to the Commission to give consideration to and to require agreement on other matters than those occurring to Congress" (Pet. App. B, p. 8). Moreover, the legislative history, cited by both the Commission (Supp. App. to Pet., pp. 127-128, 146, n. 13) and the court (Pet. App. B, notes 7 and 8, pp. 8-9), strongly supports this construction.[2] The Senate Commerce Committee, in reporting on that portion of the bill which became section 14b(9), declared (S. Rep. No. 860, 87th Cong., 1st Sess., 14):

> This provision should be read in conjunction with section 7 of the amended bill which would add a new section 43 to the Shipping Act, 1916, which would direct the Commission to make such rules and regulations as may be necessary to carry out the provisions of the Shipping Act.
>
> This broad rulemaking mandate should move the Commission, for example, to deal with three

[2] It was likewise Section 14b(9), and the legislative history cited above, which support the Commission's authority, as the court below held (Pet. App. B, pp. 8-10), "to seek uniformity to the extent possible" (*id.*, p. 9) by requiring all conferences to adopt a standard contract except for such variations as the different trade areas required.

> matters which the National Industrial Traffic League has urged upon us and upon the House committee. While we would be strongly opposed to trying to freeze into legislation the solution to any of these three problems, they present matters which it seems to us the Commission is equipped to an [sic] should deal with under its rulemaking function.

In support of their position that Congress intended no implementation of the statutory standard, petitioners point to another passage of the same Senate Report which declares that "any contract which contains the eight safeguards expressly required by the amended bill makes out a prima facie case" for approval by the Commission (Pet. 17). Petitioners fail to disclose, however, that the eighth safeguard in the amended bill on which the Senate Commerce Committee was reporting was the provision which ultimately became Section 14b(9) (S. Rep. No. 860, at p. 39). The passage quoted by petitioners thus reinforces the correctness of the decision, for the eighth safeguard to which the Committee was referring provided that the contract shall contain "such other provisions * * * as the Commission shall require * * *." (*Ibid.*)

3. The court below was plainly correct in holding that the Commission was not required to proceed on a contract-by-contract basis and adjudicate whether each contract meets the statutory standards. In formulating "the terms and conditions under which dual rates might be charged," the Commission's action, the court ruled, "was legislative rather than judicial in character. It was a prospective determination of the

standards under which the conferences were to be permitted to act in the future rather than an adjudication as to whether those standards in a particular case had been met." (Pet. App. B., p. 11.) The legislative history relied on by the court (Pet. App. B, notes 7-9, pp. 8, 9 and 11) shows unmistakably the Congressional expectation that the Commission would proceed by rule making. Petitioners have no real cause for complaint for, as the court below noted, they "have already, through the hearings which have been had, enjoyed to the fullest participation in the making of the resulting rule in the areas covered by those hearings." (*Id.*, p. 13). As to those provisions which the Commission required to be included in the contract and regarding which petitioners had not been given an opportunity to be heard, the court remanded the case to the Commission with instructions to correct the deficiency.[3]

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[3] Contrary to petitioners' assertion (Pet. 22-24), the *Swedish-American Line* case, No. 18,554, decided June 10, 1965, C.A.D.C., is not in conflict. In the first place, the Commission's disapproval of the conference agreement provisions there involved was under Section 15 of the Shipping Act, which contains no language comparable to Section 14b(9). More important, that case did not involve rule-making but merely whether the Commission's findings in an adjudicatory proceeding were sufficient to support its conclusions.

CONCLUSION

The petition for a writ of certorari should be denied.

Respectfully submitted.

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NOVEMBER 1965.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 784209 392